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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

INDIO CHARTER SCHOOL,

Plaintiff and Appellant,

v.

DELAINE EASTIN, as Superintendent of  
Public Instruction, etc. et al.,

Defendants and Respondents.

E033305

(Super.Ct.No. INC 30142)

OPINION

APPEAL from the Superior Court of Riverside County. Douglas P. Miller, Judge.  
Affirmed.

Gary G. Kreep, Richard D. Ackerman; Slovak Baron & Empey, David L. Baron,  
Peter M. Bochnewich, Charles L. Gallagher; Roger Ho and Brad Dacus for Plaintiff and  
Appellant.

Marsha A. Bedwell, General Counsel, Michael E. Hersher and Allan H. Keown,  
Deputy General Counsel, for Defendants and Respondents.

1. Introduction

The Education Code and the implementing regulations of the Code of Regulations

require a charter school to operate at least 175 days a year *and* meet the minimum requirement for instructional minutes in order to receive full state funding.<sup>1</sup> Indio Charter School (Indio) operates Monday through Thursday, 148 days a year, and an additional 33 optional days on Friday. The Department of Education withheld funds based on the number of days the school operates that are less than 175. Indio appeals a judgment denying its petition for writ of mandate seeking reinstatement of said funds and other relief.

The judgment is affirmed.

## 2. Facts

It is not disputed that Indio operates less than 175 days a year. In a declaration supporting the school's writ petition, the school's director, Kennedy Rocker, explains the reason for the four-day schedule: "It is simply impossible to fit the demographics of students who have parents who work in near migrant labor conditions and who otherwise have ties and needs to travel to Mexico on weekends when they are not involved in their very long work days, to 'fit in' to a traditional school model, and expect the students to be successful. Indio Charter School offers these students an advanced and even superior education by accommodating their needs through a four-day intensive academic schedule." Rocker asserts Indio provides more total instructional minutes than do traditional schools and "the needs of our community are best served by a lengthened

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<sup>1</sup> Education Code sections 41420, 46201, 47612.5, and Code of Regulations, Title 5, Section 11960 (Regulation 11960). All statutory references are to the Education Code  
*[footnote continued on next page]*

four-day instructional period that keeps the children in school, and off the streets, for a longer period of time Monday through Thursday.” Rocker also claims the longer days/shorter week helps eliminate high absenteeism on Fridays.

The four-day schedule, however, is somewhat different than that proposed by Indio when it originally sought approval for the school. Instead, Indio proposed a five-day school week, with a reduced or shortened fifth day, while recognizing a state requirement of a minimum number of attendance days and instructional minutes. As part of its description of the school’s educational program,<sup>2</sup> the petition to establish the charter school stated: “[T]he teaching day will be realigned into longer teaching blocks and provide increased teacher-student contact time. Four days will be lengthened to allow for more quality academic learning time and comprehensive projects. The fifth day will be a reduced day and will allow for remedial/enrichment programs without sacrificing the longer regular academic blocks. These shortened days will be held during the seasonably severe weather periods of the desert to allow for dismissal before the heat of the day. Use of a non-traditional calendar of the State-required 180 days will allow for an extended school year through June and portions of July and/or August. Use of Dark Days (or non-instructional days) for staff development and student remediation/enrichment will augment the students’ regular program and provide on-

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*[footnote continued from previous page]*  
except for references to Regulation 11960.

<sup>2</sup> Section 47605.

*[footnote continued on next page]*

going staff development time which does not interrupt student academic learning. This will allow students to meet and exceed the minimum number of attendance days and minutes for instruction.”

On appeal, Indio incorrectly asserts that it received approval for a shorter school week. The undisputed factual record contradicts this contention. Although the department admits the Riverside County Board of Education approved Indio’s charter, the charter contemplates the school operating five days a week for a total of 180 days.

### 3. Discussion

We conduct an independent standard of review: “Where, as here, the facts are undisputed and the issue involves statutory interpretation, we exercise our independent judgment and review the matter de novo.”<sup>3</sup>

Regular public schools must operate at least 175 days a year to receive full state funding:

“(a) No school district, other than one newly formed, shall, except as otherwise provided in this article, receive any apportionment based upon average daily attendance from the State School Fund unless it has maintained the regular day schools of the district for at least 175 days during the next preceding fiscal year.

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*[footnote continued from previous page]*

<sup>3</sup> *Alliance for a Better Downtown Millbrae v. Wade* (2003) 108 Cal.App.4th 123, 129 citing *International Federation of Professional & Technical Engineers v. City and County of San Francisco* (1999) 76 Cal.App.4th 213, 224.

“(b) If any school within a school district fails to maintain its school for the required 175 days, the Superintendent of Public Instruction shall withhold from the district’s apportionment based upon average daily attendance a product of 0.01143 times the district’s apportionment for each additional day the school would have had to maintain operations to meet the 175 day requirement.”<sup>4</sup>

In addition, for each grade, state law establishes a different minimum number of instructional minutes, ranging from 36,000 minutes for kindergarten to 64,800 minutes for grades 9 through 12.<sup>5</sup>

Charter schools are governed by section 47600 et seq., the Charter Schools Act of 1992. “Charter schools are ‘part of the Public School System’ but ‘operate independently from the existing school district structure.’”<sup>6</sup> A charter school is established by petition which is granted by the governing board of the school district,<sup>7</sup> the county board of education,<sup>8</sup> or the State Board of Education.<sup>9</sup> Among the express legislative purposes of the Act are to “[e]ncourage the use of different and innovative teaching methods” and to

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<sup>4</sup> Section 41420.

<sup>5</sup> Section 46201.

<sup>6</sup> *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 938.

<sup>7</sup> Section 47605.

<sup>8</sup> Sections 47605.5 and 47605.6.

<sup>9</sup> Section 47605.8.

“[p]rovide parents and pupils with expanded choices in the types of educational opportunities that are available within the public school system.”<sup>10</sup>

Just like for public schools, the statutory scheme for charter schools apportions funding based on both instructional minutes and average daily attendance. The annual computation of “a general-purpose entitlement, funded from a combination of state aid and local funds, for each charter school” is based on average daily attendance.<sup>11</sup> As part of the general requirements for charter schools, section 47612.5 provides:

“(a) Notwithstanding any other provision of law and as a condition of apportionment, a charter school shall do all of the following:

“(1) Offer, at a minimum, the same *number of minutes of instruction* set forth in paragraph (3) of subdivision (a) of Section 46201 for the appropriate grade levels. [¶] . . . [¶]

“(c) A reduction in apportionment made pursuant to subdivision (a) shall be proportional to the magnitude of the exception that causes the reduction. For purposes of paragraph (1) of subdivision (a), for each charter school that fails to offer pupils the minimum *number of minutes of instruction* specified in that paragraph, the Superintendent of Public Instruction shall withhold from the charter school’s

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<sup>10</sup> Section 47601, subdivisions (c) and (e).

<sup>11</sup> Section 47633; *Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.*, *supra*, 98 Cal.App.4th 934, 938.

apportionment for *average daily attendance* of the affected pupils, by grade level, the sum of that apportionment multiplied by the percentage of the minimum *number of minutes of instruction* at each grade level that the charter school failed to offer. [¶] . . . [¶]

“(e)(1) . . . For purposes of calculating *average daily attendance* for classroom-based instruction apportionments, at least 80 percent of the instructional time offered by the charter school shall be at the schoolsite, and the charter school shall require the attendance of all pupils for whom a classroom-based apportionment is claimed at the schoolsite for at least 80 percent of the minimum instructional time required to be offered pursuant to paragraph (1) of subdivision (a) of Section 47612.5. [Emphasis added.]”

Section 47612 provides: “(a) A charter school shall be deemed to be under the exclusive control of the officers of the public schools . . . with regard to the appropriation of public moneys to be apportioned to any charter school, . . .

“(b) The *average daily attendance* in a charter school may not, in any event, be generated by a pupil who is not a California resident.”

Regulation 11960, promulgated in 1993, provides charter school funding is based on average daily attendance of 175 days:

“(a) As used in Education Code section 47612, ‘attendance’ means the attendance of charter school pupils while engaged in educational activities required of them by their charter schools, on days when school is actually taught in their charter schools. ‘Regular *average daily attendance*’ shall be computed by dividing a charter school’s total number

of pupil-days of attendance by the number of calendar days on which school was actually taught in the charter school. For purposes of determining a charter school's total number of pupil-days of attendance, no pupil may generate more than one day of attendance in a calendar day.

“(b) The State Superintendent of Public Instruction shall proportionately reduce the amount of funding that would otherwise have been apportioned to a charter school on the basis of *average daily attendance* for a fiscal year, if school was actually taught in the charter school on fewer than 175 calendar days during that fiscal year. [Emphasis added.]”

Indio argues that it is exempt from the 175-day requirement based on section 47610, which states, with some exceptions not relevant: “A charter school shall comply with this part and all of the provisions set forth in its charter, but is otherwise exempt from the laws governing school districts . . . .”

Indio is wrong. First, “this part,” as referred to in the statute, is Part 26.8 of Division 4, Title 2 of the Education Code, governing charter schools. The statutes of Part 26.8, sections 47600 through 47664 inclusive, both expressly and by reasonable inference incorporate the requirement of average daily attendance for funding allocations. The phrase “average daily attendance” appears multiple times throughout the charter school statutes and the requirement obviously applies to charter schools. Regulation 11960 simply augments and amplifies what is already contemplated under the statutes.



Additionally, Indio's own charter contemplates a 180-day school year, composed of five-day school weeks with the fifth day being a reduced day. In order to comply with its charter, Indio must operate a five-day school week.

Furthermore, by statute and according to Indio's charter, Indio must also meet the state's minimum instructional minutes requirements. No statutory authority supports Indio's contention that it is or should be exempt from the minimum 175-day school year even if it meets the additional minimum instructional minutes requirement.

We do not agree that our holding is contrary to legislative intent. Section 47612.5 requires charter schools to require the minimum number of instructional minutes. It then bases the apportionment of funding on average daily attendance, required by Regulation 11960 to be 175 days. A charter school may operate more days or it may operate a lesser number of days but then it will lose part of its funding.

Regulation 11960 is a duly-adopted, quasi-legislative regulation that enjoys the dignity of a statute. Regulation 11960 was within the department's delegated authority to promulgate and the regulation was reasonably necessary to implement funding apportionments based on average daily attendance. It is entitled to the greatest judicial deference.<sup>12</sup> Furthermore, the Legislature's acquiescence in long-standing administrative

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<sup>12</sup> *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11.

practice since 1993 entitles Regulation 11960 to a presumption of correctness.<sup>13</sup> Finally, under the appropriate principles of statutory interpretation, repeal by implication is highly disfavored.<sup>14</sup>

Regulation 11960 implements sections 41420 and 46310 that set forth the required length of the school year for apportionment purposes and the method of computing average daily attendance. Charter school funding is properly apportioned based on sections 41420, 46201, 47612.5, and Regulation 11960.

#### 4. Disposition

The judgment is affirmed. The prevailing parties shall recover their costs.

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/s/ Gaut  
J.

We concur:

/s/ McKinster  
Acting P.J.

/s/ Richli  
J.

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<sup>13</sup> *Western States Petroleum Assn. v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1006-1007.

<sup>14</sup> *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 379.